QUESTIONS PRESENTED

I. Whether 38 U.S.C. § 2024(d) was designed to provide employees short leaves of absence from their civilian employment for service as National Guard members at weekend drills, two week annual encampments, and special training or instruction periods lasting thirty, sixty or ninety days.

II. Whether leaves of absence under 38 U.S.C. § 2024(d) are governed by reasonableness.

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STATEMENT OF THE CASE

1. The question in this case is whether petitioner is entitled to a leave of absence from his civilian job to serve for three years in the National Guard.

Petitioner, William "Sky" King, was employed by the Hospital on September 24, 1979 as manager of its security department where he supervised twenty-one employees including three supervisors. King advised the Hospital on many matters pertaining to the safety and welfare of its employees and patients.

King's position with the Hospital included high profile public relations involving daily contact with the Hospital's patients, employees, the general public, and the Hospital's professional staff of doctors.

When he sought a leave of absence, King had been a member of the Alabama National Guard for thirty-five years. While employed with the Hospital, he served on numerous tours of training, some of which were military leaves of absence.

In June, 1987, while King was on his mandated two-week summer camp with the National Guard, he applied to become the State Command Sergeant Major for the Alabama National Guard. King was aware that the position he sought required a full-time, three-year commitment. However, when King returned from his leave in late June he did not advise the Hospital of his application. King did telephone the Veterans Reemployment Rights office in Atlanta, Georgia, and was advised that he was entitled to serve up to four years on "active duty" and have reemployment rights upon his return. King made this inquiry to the Veterans Reemployment Rights Office before learning on Saturday, July 18, 1987, that he had been selected for the position.

After King accepted the appointment, he informed the Hospital that he would be taking the National Guard position.

King looked upon the position of State Command Sergeant Major with respect and felt honored to be considered and chosen for this position. King's last day of work at the Hospital was August 14, 1987 and he began his duties with the National Guard in Montgomery, Alabama on August 17, 1987.

On September 8, 1987, the Hospital, after receiving advice of counsel, advised King of its decision to deny his leave request on the basis that it did not qualify under the provisions of the Veterans Reemployment Rights Act and that King's request for such a lengthy period of leave time was unreasonable (R.15-19).

2. The Court of Appeals for the Eleventh Circuit found that King was not entitled to a three-year leave of absence under 38 U.S.C. § 2024(d) since to grant him a leave for such a duration was *per se* unreasonable and unreasonable as a matter of fact.

3. King's orders were issued pursuant to 32 U.S.C. § 502(f). The parties stipulated that whatever leave of absence rights King may have would flow to him pursuant to § 2024(d) by virtue of his status as a member of the National Guard engaged in "active duty for training."

4. The Solicitor on behalf of King claims that King is entitled to a three-year leave of absence under 38 U.S.C. § 2024(d) since leaves of absence under § 2024(d) are unlimited in duration. The Hospital contends that leaves pursuant to § 2024(d) are limited to short periods of time such as weekend drills, two-week summer camps, and other activity of 30, 60 or 90 days. Contrary to the Solicitor, the Hospital claims that the "reasonableness test" is an appropriate aid to judicial interpretation, except that a leave of three years is too long to escape the *per se* rule imposed by the Eleventh Circuit. The position of the Hospital is supported by the language of § 2024, its context in the broader law, and its purpose and legislative history. For these reasons, and in the absence of strict durational limitations in the statute, the Eleventh Circuit appropriately applied the "reasonableness test" in support of the will of Congress.

5. There have been no substantive amendments to § 2024(d) since its enactment in 1960. While the Solicitor claims that a structural or technical amendment to § 2024(f) erased the legislative intent accompanying the enactment of § 2024(d), there is no support for this position as there is no support for the further position that a 1964 amendment to 32 U.S.C. § 502 in the form of adding § 502(f) changed the leave entitlement under § 2024(d).

SUMMARY OF ARGUMENT

Title 38 U.S.C. § 2024(d) was enacted to provide employment rights and benefits to its employees for the purpose of participating in weekly drills, two-week annual summer camps, and other training or instruction periods of short duration. The intent of Congress is revealed by the words used in the statutes, especially when compared with the provisions used to provide rights and benefits to veterans returning to work after serving on active duty or initial active duty for training. Employee status is not broken when an employee serves on National Guard duty referred to in 38 U.S.C. § 2024(d) as "active duty for training," but, as stated in the statute, such an employee is required to return to work "at the beginning of the next regularly scheduled working period." These provisions show that an employee engaged in active or inactive duty for training is expected to be absent for only short durations and certainly not for a three-year period.

Congress has provided that these persons would be entitled to leaves of absence rather than reemployment as is the case

after a period of active duty which is further indication that leaves pursuant to § 2024(d) are limited in duration.

The purpose and the history of § 2024(d) clearly establishes member-employees were provided protection solely for the purpose of leaving their full-time civilian jobs and participating as part-time soldiers for short, annual periods.

Those parts of § 2024(d) that indicate it was only applicable to short-term leaves of absenee are the parts that would render it unreasonable if applied to leaves of extended duration. The leaves of absence concept, as an example, is a concept not ordinarily applied to periods of three-years or longer. The same applies to the concept of an immediate return to work following such a lengthy leave. Also, it is unreasonable to expect an employer to return an employee to the precise job the employee left three-years earlier, especially where, unlike the other components of §§ 2021 and 2024, the return is without regard to the qualifications of the employee to perform the job after an extended leave. It is unreasonable to expect an employer to return an employee to work after a week-end or two-week summer leave on the same terms as an employee who has been gone for an extended period of time.

The breaking point between short-term and long-term leaves appears to be the minimum twelve-week period required under § 2024(c) before the reemployment rights of § 2021(a)(B) are applicable and those periods less than twelve weeks when the leave of absence rights in § 2024(d) are applicable. In the absence of an expression of duration in § 2024(d), the courts below, to avoid the unreasonable and unintended results of long-term leaves, applied the rule of reason.

In so doing, the court found that a three-year leave was so far removed from the statute's scope and coverage that it would be *per se* unreasonable to submit it to the balancing

test of reasonableness. The Court also found the requested three-year leave request, in fact, unreasonable based essentially upon the extended leave request by a member of the Hospital's Management without regard for the interim needs of the Hospital. In reaching the result, the Eleventh Circuit implicitly found that a construction of § 2024(d) giving a National Guard person rights and benefits beyond those provided to active duty persons would be unreasonable.

There has not been an amendment to § 2024(d) since its enactment and the 1964 amendment to 32 U.S.C. § 502 did not expand the rights protected by § 2024(d) even though Congress in 1980, amended § 2024(f) by making some of the activity embraced by § 502 "active duty for training" where it had previously been labeled, "inactive duty training" in § 2024(f). The rights afforded a National Guard person pursuant to § 2024(d) are the same whether the leave is for the purpose of attending a week-end drill or participating in training or instruction periods of 30, 60 or 90 days.

ARGUMENT

I. 38 U.S.C. § 2024(d) WAS DESIGNED TO PROVIDE EMPLOYEES SHORT LEAVES OF ABSENCE FROM THEIR EMPLOYMENT FOR SERVICE AS NATIONAL GUARD MEMBERS AT WEEKEND DRILLS, TWO WEEK ANNUAL ENCAMPMENTS, AND SPECIAL TRAINING OR INSTRUCTION PERIODS LASTING THIRTY, SIXTY, OR NINETY DAYS.

Since 1940 Congress has provided reemployment rights to veterans. "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946); *see also Monroe v. Standard Oil*

Co., 452 U.S. 549, 554-56 (1981). Presently codified at 38 U.S.C. §§ 2021-2026, these statutory rights are contained in the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (hereinafter "Act").[1] The Act is designed to protect the employment rights of persons who are inducted into active duty military service,[2] those who enlist and serve on active duty,[3] those who are ordered or called to active duty,[4] those who serve an initial period of active duty for training,[5] and employees who are members of the Reserves or National Guard and who need leaves of absence from their employers to participate in military training.[6]

A. *Policy or wisdom of particular interpretation should be addressed to legislators.*

The Solicitor, on behalf of William "Sky" King, correctly states the "question in this case" as whether King is entitled under 38 U.S.C. § 2024(d) to a three-year leave of absence from his employment as the Protective Services Manager at St. Vincent's Hospital to serve as State Command Sergeant Major in the Alabama National Guard. Analysis of this question, however, does not, "require[] consideration of the role of the National Guard and the Reserve forces" in our national defense. Brief of Petitioner at 2.[7] Rather, the answer to this

[1]Pub. L. No. 93-508, §§ 2021-2026, 88 Stat. 1578 (1974).
[2]38 U.S.C. § 2021.
[3]38 U.S.C. § 2024(a).
[4]38 U.S.C. § 2024(b).
[5]38 U.S.C. § 2024(c).
[6]38 U.S.C. § 2024(d).
[7]The Solicitor stresses the role of the National Guard in the broad scheme of our National defense and urges that a durational limit on leaves of absence under 2024(d) "hobbles the Nation's ability to recruit Reservists . . . . As a result, the readiness and integrity of the Reserve components, and of the Armed Forces as a whole, is compromised." Brief of Petitioner at 13. For example, the Solicitor argues that "[c]hanges in defense policy within the last generation have dramatically transformed the role of the Reserve components . . . [and that] significant curtailment of the protections afforded Reservists under Section 2024(d) would have an especially adverse impact on military preparedness." Brief of Petitioner at 20. Arguments which on their face relate only to the policy or wisdom of a particular interpretation are more appropriately addressed to legislators or administrators, not to judges. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978).

question lies in the language of the statute and the purpose Congress sought to accomplish through its enactment.[8]

B. *The core issue involves interpretation of the language used in 38 U.S.C. § 2024(d), 32 U.S.C. 502(f), a 1980 amendment to 38 U.S.C. 2024(f), and the history and purpose of these enactments.*

The parties in this case disagree over the language and legislative history of 38 U.S.C. § 2024(d) and 32 U.S.C. § 502. There appears to be partial agreement with regard to

[8]The language employed in the statute is the foremost guide to legislative intent. *See United States v. Rutherford*, 442 U.S. 544, 551 (1979). Nevertheless, statutory language is rarely so clear that the legislative purpose or history is totally irrelevant. The Court is not limited to the bare literal words of a statute and will look at all indicia of legislative intent. *Cass v. United States*, 417 U.S. 72, 77-79 (1974); *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 543-44 (1940); *United States v. Dickerson*, 310 U.S. 554, 562 (1940); *see also Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Tel. Co.*, 464 U.S. 30, 34 (1983) ("Our analysis of the statute and its legislative history convinces us that in passing the Relocation Act Congress addressed the needs of residential and business tenants and owners, and did not deal with the separate problem posed by the relocation of utility service lines."); *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 55 (1942) ("where the plain meaning of words used in a statute produces an unreasonable result, 'plainly at variance with the policy of the legislation as a whole, we may follow the purpose of the statute rather than the literal words"); *United States v. Stone and Downer Co.*, 274 U.S. 225, 252 (1927) ("In other words, the pole star of interpretation of statutes . . . must be the intention of Congress when that can be clearly ascertained and is reasonably borne out by the language used."). *United States v. Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C.J.) ("Where the mind labours to discover the design of the legislature, it seizes everything from which that can be derived. . .").

the "whole law," but disagreement dominates when § 2024(d) is considered as a component of the whole law. Dramatic differences exist as to the "purpose" of § 2024(d). In sum, and with great simplicity, the Solicitor argues that, under § 2024(d), King is entitled to "a leave of absence . . . for the period required to perform active duty for training" and that the "period required" flows directly from § 502(f) by virtue of the words "training and other duty." However, a proper analysis reveals that § 2024(d) was designed for leaves of short-term duration covering National Guard "employees" in the bottom category[9] of employment rights, described by Congress as "active duty for training" and "inactive duty training."

There is at least one area of agreement: the Solicitor concedes that § 2024(d) was enacted at a time when there were only "short and intermittent training obligations." He argues, however, that the legislative intent at the time of enactment "simply reflect[s] the range of training requirements in place at the time" but does not preclude "creating longer tours of 'active duty for training.'" Brief of Petitioner at 30-31. Such an interpretation is absolutely contrary to the legislative intent underlying the amendment of 32 U.S.C. § 502 to add subsection (f),[10] particularly the examples used to convey the intended limitations.[11] Moreover, and in concrete terms, the enactment stated it was "not intended to encourage any additional training with pay" or "to encourage any additional drill pay periods."[12]

[9]"Bottom" in this regard refers to that category where the needs of the employee are less than anywhere else in the statute and the detriment to the employer is more limited than the other categories. King, on the other hand, contends that § 2024(d), occupies the "top" category. Of course, King also claims that § 2024(d) covers the bottom as well as the top.

[10]Act of Oct. 3, 1964, Pub. L. No. 88-621, § 1(1), 78 Stat. 999 (1964), discussed *infra*.

[11]S. Rep. No. 1584, 88th Cong., 2d Sess. *reprinted in* 1964 U.S. Code Cong. & Admin. News 3800-3802.

The Solicitor contends that § 2024(d) permits unlimited leaves of absence and allows an employee "to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent . . . . " upon the completion of that employee's military service. 38 U.S.C. § 2024(d).[13] The interpretation urged by the Solicitor, however, is not only inconsistent with the legislative history of § 2024(d), discussed *infra*, but such interpretation offends the purpose of and words used in subsection (d), discussed *infra*.

1. *The language of 38 U.S.C. § 2024(d) shows that Congress enacted it to provide employees with short term leaves of absence from their employment to serve as members of the National Guard.*

"The 'plain purpose' of legislation . . . is determined in the first instance with reference to the plain language of the statute itself." *Board of Governors of the Federal Reserve System v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986). Section 2024(d) provides in pertinent part:

> Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training . . . . Upon such employee's release from a period of such active duty for training or inactive duty training . . . such employee shall be permitted to return to such

[12]*Id.* at 3801.

[13]The Army Guard Reserve Program provides for periods of active duty of up to five years and these periods of active duty may be renewed upon completion. 10 U.S.C. § 679(a).

> employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent . . . . Such employee shall report for work at the beginning of the next regularly scheduled working period . . . following such employee's release . . . .

38 U.S.C. § 2024(d).

Subsection (d) is replete with the term "employee." No other subsection in either § 2021 or § 2024 refers to the class of person protected as "employees."[14] Section 2021 applies to "any person . . . inducted . . . ." 38 U.S.C. § 2024(a) and (b)(1) address the protection afforded to "any person who . . . enlists" or "enters upon active duty." 38 U.S.C. § 2024(b)(2) and (c) address the protection afforded to "any member of a Reserve component." The words used in § 2024(d) thus suggest a continuing employment relationship during a "leave of absence" to perform training in the Reserves or National Guard. The continuing employment relationship belies the Solicitor's argument that leaves of unlimited duration are allowed under § 2024(d).[15] Leaves of unlimited duration are inconsistent with a continuing employment relationship.[16]

That the provision was intended to protect only short leaves is supported by § 2024(d)'s mandate that the employee be "*return[ed]* to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent . . . ." Every other subsection requires that "any person" or "member" be *restored* to such position *or to a like position*.[17] Applying its common meaning, "restore" implies that employment is to be reestablished, renewed, or revived, that the person or member is to be reinstated to "such position or to a position of like seniority, status, and pay." If the person is reinstated, the employment relationship was at some point terminated. Just as the word "employee" suggests continuing employment, however, the word "return" infers only a short absence from work. This interpretation is further buttressed by the fact that,

[14]38 U.S.C. § 2024(e) also provides leave of absence protection to "[a]ny *employee* not covered by subsection (c) . . . during the period required to report for the purpose of being inducted into, entering, or determining, by a preinduction or other examination, physical fitness to enter the Armed Forces." Subsection (e) provides that the "employee" upon rejection or upon completion of the examination "shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) . . . ." (emphasis added).

[15]Because reservists may serve for periods of active duty up to five years and these periods of active duty may be renewed, 10 U.S.C. § 679(a), a reservist, under the Solicitor's view, could conceivably obtain leaves from his civilian employment for four five-year tours, retire, and then expect to return to his civilian employment twenty years later "with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes." 38 U.S.C. § 2024(d).

[16]This Court has previously recognized that the word employee is difficult to define making resort to the legislative history appropriate. *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 545 (1940) ("The word, of course, is not a word of art. It takes color from its surroundings and frequently is carefully defined by the statute where it appears.")

[17]Those persons who enlist, who enter active duty in response to a call, and members of the Reserves who serve an "initial period of active duty not less than twelve consecutive weeks" are limited to the "reemployment rights and benefits provided . . . for persons inducted . . . ." 38 U.S.C. § 2024(a) (b) and (c) (exceptions apply to length of service which is not to exceed four years unless "unable to obtain orders relieving such person from active duty"). Under 38 U.S.C. § 2021, persons inducted are to "be *restored* . . . to such position or to a position of like seniority, status, and pay; . . . unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." 38 U.S.C. § 2021(a)(B) (emphasis added). For those whose protection falls under § 2024(a) through (c), the employer is relieved of any obligation to reemploy at any position if "the employer's circumstances have so changed as to make it impossible or unreasonable to do so." 38 U.S.C. § 2021(a)(B). There is no such relief afforded employers under § 2024(d) and the statute mandates the employee be returned.

under § 2024(d), all the employee must do is "report" for work; whereas, every other "person" or "member" must make "application for reemployment." "Application for reemployment" clearly demonstrates that the employment relationship was severed.[18] The words "employee," "return" and "report" as opposed to "person," "member," "restore" and "application for reemployment" signal the scope of the limited rights granted under § 2024(d).

Accordingly, § 2024(d) can apply only to leaves of short duration because it mandates that the employee "shall report for work at the beginning of the next regularly scheduled working period . . . ." If the employee is away from his or her civilian employment for a (three-six-or ten-year period), it is impractical to expect such an employee to report for work at the next regularly scheduled shift.[19] It is unreasonable to expect an employer to "calendar" the return of an employee after a lengthy, three-year, leave of absence with such great precision. Read literally, the employee would simply have to "show up" for work. This, to anyone who has ever met a payroll, is a strange concept where a prolonged absence is involved. Section 2021 and the other subsections of § 2024 which contemplate extended absences avoid this problem by giving the employee time to "apply" for

[18]This Court has previously held that "[a] furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence." *Fishgold v. Sullivan Drydock Repair Corp.*, 328 U.S. 275, 287 (1946). And the consequences of either a furlough or leave of absence "are quite different from terminations of the employment relationship .... An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains the right to be restored to work under specified conditions." *Id.*

[19]An employee who fails to report to work at the next regularly scheduled working period can lawfully be terminated if the employer's "conduct rules . . . pertaining to explanations and discipline with respect to absence from scheduled work" allow such. 38 U.S.C. § 2024(d).

reemployment and the employer time to find work for the employee to perform.[20]

Also consistent with leaves of short duration, and inconsistent with lengthy leaves, is § 2024(d)'s requirement that the employee be returned to "such employee's position." Compare this to persons protected pursuant to § 2021(a)(B), who are to be granted their former positions or a "like position" only "if still qualified." The rights and benefits of every other class are also contingent upon changed "employer's circumstances" which may render it "impossible or unreasonable" to reemploy the person. Read literally, the return provision in § 2024(d) would preclude an employer from permanently filling a position during a three-year or longer leave of absence because the employee must be returned to his or her former position. Unresolved questions that would occur under the Solicitor's proposed application of § 2024(d) include whether the employer could abolish that position during the leave and, if so, the rights, if any, the employee would have to a redefined or "like" position upon return. The statute does not address the obligations the employer would owe an employee whose position has been abolished or redefined. It is unlikely that these problems would occur during leaves of short duration. The converse is true where long-term leaves are involved.

[20]For example, § 2024(c) allows a member of a Reserve unit returning from an initial period of training to make application for reemployment "within thirty-one days after . . . release from . . . active duty . . . ." Persons protected under § 2021 and under § 2024(a) and (b) are entitled to make "application for reemployment within ninety days after such person is relieved from training or service . . . ." 38 U.S.C. § 2021(a). This period of time within which to apply for reemployment assists the veteran because "[h]e is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).

Finally, the lack of job protection provided under § 2024(d) upon return also indicates that Congress contemplated only short leaves of absence thereunder; whereas it clearly anticipated lengthier service under other provisions of the Act. Section 2024(c) provides that a person "shall not be discharged . . . without cause within six months after that restoration." Section 2021 and § 2024(a) and (b) provide that the person "shall not be discharged from such position without cause within one year after restoration or reemployment." 38 U.S.C. § 2021(b)(1). The initial period of active duty for training protected by § 2024(c) has a minimum floor of twelve weeks and a typical maximum of six months. One can infer that the shorter period of active duty envisioned by § 2024(c) is the reason why its post-return protection is less than the post-return protection afforded those covered by §§ 2021 and 2024(a) and (b). Also, since leaves under § 2024(d) were intended to be of short duration, Congress simply created a continuing "employee" status without any post-return protection.

Beyond this, by enacting 38 U.S.C. § 2024(d), Congress intended to create a protected class of employees engaged in "active duty for training" and "inactive duty training." While the words used to describe these activities have no common meanings, the words discussed above, such as "employee," return," "such position," "leave-of-absence," "report," and "next regularly scheduled working period" are words that do have common meanings and are more appropriately applicable to short-term absences than to long-term absences. The Solicitor's proposed interpretation does not recognize that the special words used in § 2024(d) have meanings separate and apart from the words used in § 2021 and other subsections of § 2024.

2. *The context of 38 U.S.C. § 2024(d) in the body of the law as a whole shows that the enactment was to provide only short-term leaves of absence.*

The Solicitor also does not analyze the provisions of § 2024(d) against the backdrop of the "whole law."[21] The body of statutory law governing this area provides rights, in descending order of importance, to those on active duty; either inductees, enlistees, or persons ordered or called to active duty.[22] The law then grants employment rights to persons engaged in an "initial" period of "active duty for training."[23] Finally, in § 2024(d), Congress provides rights to those involved in training, other than the "initial period," referred to as "active duty for training" and "inactive duty training." It is exclusively this latter "member"[24] the Solicitor contends is deserving of leaves of unlimited duration. Looking at the statute in context, however, it is impossible to believe that Congress intended to grant greater rights to those involved in

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[21] "On a pure question of statutory construction, our first job is to try to determine Congressional intent, using traditional tools of statutory construction." *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987). Our "starting point is the language of the statute," *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5, 105 S.Ct. 2458, 2461, 86 L.Ed.2d 1 (1985), but "'in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Massachusetts v. Morash*, 490 U.S. 107, ___, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98 (1989), quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987). *See also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 C.Ed.2d 313 (1988) (same).

Dole v. United Steelworkers of America, 494 U.S. 26, __, 110 S. Ct. 929, 934 (1990).

[22] 38 U.S.C. § 2021 (inductees); 38 U.S.C. § 2024(a) (enlistees); and 38 U.S.C. § 2024(b) (those called or ordered).

[23] 38 U.S.C. § 2024(c).

[24] See footnote 20, *infra*.

"active duty for training" and "inactive duty training" than it granted to persons engaged in "active duty."

Rather, it is evident that Congress established a scheme of employment protection balancing the employees' needs against the impact on the employer. In every category or class, except inductees, Congress weighed the need of the employee against the burden on the employer and established durational limits. Congress determined that the reemployment protection for those persons inducted overrode any burden placed on the employer and set no durational limits on an inductee's reemployment rights, probably because he occupied an involuntary status.[25] Congress placed a durational limit of four years on the reemployment rights of those who enlist, with an additional year of protection if additional service is at the request and for the convenience of the Federal Government.[26] Those persons entering active duty in response to an order or call were also limited to four years of protection, plus any additional period for which such person was unable to obtain orders relieving him or her from active duty.[27] Finally, members of the Reserves were given the same reemployment protection as those entering in response to an order or call, "not to exceed that period . . . which the President is authorized to order . . ." and only if service is "at the request and for the convenience of the Federal Government."[28] That only short-term leaves were contemplated by Congress under § 2024(d) is demonstrated by the placement of these leaves at the bottom of the employment rights scheme. "Employees" entitled to rights under § 2024(d) are expected to be part-time soldiers and full-time civilian employees. If granted the right to extended leaves of absence of

[25]38 U.S.C. § 2021.
[26]38 U.S.C. § 2024(a).
[27]38 U.S.C. § 2024(b)(1).
[28]38 U.S.C. § 2024(b)(2).

three years or more, the identity of the true employer will shift to the military.

The interpretation of § 2024(d) urged by the Solicitor does not fall within hierarchical scheme of protection afforded by the law, but instead focuses upon the "new" scheme of national defense and the program referred to as "AGR." In proposing this interpretation, however, the Solicitor has failed to note that Congress has not changed § 2024(d) since its original enactment in 1960[29] as an amendment to the Universal Military Training and Service Act.[30] At that time there was no "AGR" nor had 32 U.S.C. § 502(f), as discussed *infra*, been enacted.

3. *The legislative history and purpose of 38 U.S.C. § 2024(d) clearly show that it was enacted to allow leaves of absence for military training obligations lasting less than three months.*

The interpretation of the legislative history of § 2024(d) is another area of glaring difference between the parties. In the Hospital's view, the purpose of the legislation is clear and unequivocal.[31] The stated maximum leave of not over 90 days,[32] the reference to leaves of "short duration,"[33] and the

[29]Act of July 12, 1960, Pub. L. No. 86-632, § 1, 74 Stat. 467 (1960); S. Rep. No. 1672, 86th Cong., 2d Sess., *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3078-79.
[30]Pub. L. No. 82-51, 82 Stat. _, (1951).
[31]"This section was designed to provide reemployment protection for trainees . . . for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training or instruction periods that may last for 30, 60, or 90 days." S. Rep. No. 1672, 86th Cong., 2d Sess. *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3078; *see also* H.R. Rep. No. 1263, 86th Cong., 2d Sess. 6 (1960) ("those individuals on active duty training under orders which contemplate service of less than 3 months and all other training . . . for lesser periods of time are covered by this section").
[32]*See supra* note 31.
[33]*See supra* note 31.

coverage for leaves of "lesser periods of time"[34] creates no doubt that leaves of absence under § 2024(d) are indeed limited in duration. The Solicitor's claim that the purpose of § 2024(d) was "broad;" that it included only a description of the training opportunities then offered; and that the purpose did not "prevent the military from . . . creating longer tours of active duty for training"[35] is simply not supported by the will of Congress.[36] It is a long jump from 30, 60, or 90 days[37] to a leave of 1095 days which is subject to further extensions. The purpose of the enactment would be completely changed if this jump were made. The intent of the enactment would be destroyed.

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[34]*See supra* note 31.

[35]Brief of Petitioner at 30-31.

[36]The provision in § 2024(d) requiring a covered employee on leave to "report for work at the beginning of his next regularly scheduled working period" was originally enacted in the Act of July 12, 1960, Pub. L. No. 86-632, § 1, 74 Stat. 467 (1960), because the provision in the prior law allowing inactive duty trainees 30 days to report for work was "unrealistic." S. Rep. No. 1672, 86th Cong., 2d Sess. *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3078. For reasons not shown in the bill or its history, this provision covers "active duty for training" and "inactive duty training." The rationale for the amendment appears applicable only to leaves of short duration. As stated *supra*, at note 15, this provision would produce harsh and unreasonable results if extended to three-year leaves. The provision remains in the law and it lends credence to the construction that Congress never intended § 2024(d) to apply to leaves beyond three months in duration.

[37]The Senate Report illustrates the types of activity protected by the enactment, including those engaged in by persons "ordered to duty as instructors at rifle ranges," "attending 48 drills each year and . . . participat[ing] in active duty for training at least 15 days each year," "participat[ing] in summer camps and maneuvers," "attend[ing] schools conducted by the Regular Army and . . . participat[ing] in small arms competitions," "attending service schools, such as the Command and General Staff School, and to receive pilot training." S. Rep. No. 1672, 86th Cong. 2d Sess. (1960) *reprinted in* 1960 U.S. Code Cong & Admin. News 3077, 3079. These examples plainly establish the scope and the duration of the law.

4. *No action by Congress indicates that the protection afforded under § 2024(d) was expanded by the 1980 amendment to § 2024(f) that requires active duty for training under 32 U.S.C. 502(f).*

The Solicitor contends[38] that a 1980 amendment to 38 U.S.C. Section 2024(f)[39] adding duty under 32 U.S.C. § 502 to the definition of "active duty for training" was an expansion of protection afforded under § 2024(d), and that this indicates Congress's intent that § 2024(d) apply to extended leave requests.[40]

King was ordered to full-time duty (State) in Active Guard/Reserve status by the Governor of the State of Alabama pursuant to 32 U.S.C. § 502(f). Section 502(f) provides in pertinent parts:

> (f) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may
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> (1) without his consent, but with the pay and allowance provided by law; or
>
> (2) with his consent, either with or without pay and allowance;

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[38]Brief of Petitioner at 33-35.

[39]Veterans Rehabilitation And Education Amendments of 1980, Pub. L. No. 96-466, § 511, 94 Stat. 2171, 2207 (1980); H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979).

[40]Amended § 2024(f) reads as follows:

> (f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504, or 505 of Title 32 is considered active duty for training. For the purposes of subsection (d) of this section, inactive duty training performed by that member under section 502 of Title 32 or section 206, 301, 309, 402, or 1002 of Title 37 is considered inactive duty training.

> be ordered to perform *training or other duty* in addition to that prescribed under subsection (a). Duty without pay shall be considered for all purposes as if it were duty with pay.

32 U.S.C. § 502(f) (emphasis added). The Solicitor asserts that the term "other duty" encompasses King's leave request and that by amending § 2024(f) to make § 502(f)'s "duty" active duty for training, Congress "deliberately extended the benefits of Section 2024(d) to Reservists serving in the AGR program." Brief of Petitioner at 33.

With due deference to the Solicitor, the argument that Congress amended subsection 2024(f) to "deliberately" expand § 2024(d) benefits to those serving pursuant to the AGR program is simply not the case. Section 2024(d) draws no distinction between the leave of absence rights afforded those engaged in "active duty training" and "inactive duty training." Both categories receive identical employment rights under § 2024(d).[41]

The 1980 amendment can only be explained on the basis that all of the activity under § 502 does not necessarily involve "training."[42] The same is true of the activities under §§ 503-505. The full-time service under those sections became "active duty for training" simply because Congress in § 2024(f) stated that such activity would be deemed "active duty for training" for purposes of subsections (c) and (d). Without this expression, activity under §§ 503-505 that did

[41]The House Report relied upon by the Solicitor evidences Congress's desire to provide "the same reemployment rights" to persons performing "full-time training or duty" under 32 U.S.C. § 502 "as current law provides following duty under Section 503-505 . . . ." H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979).

[42]When § 2024(d) was originally enacted in 1960, *see supra* notes 29, 30 and accompanying text, summer encampments under § 502 were described as "active duty for training." S. Rep. No. 1672, 86th Cong., 2d Sess. *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3079.

not involve "training" would not be reached by subsections (c) and (d). Persons engaging in such would not be protected by § 2021 or § 2024(a) or (b).[43] To provide them employment protection, despite their full-time service and despite the fact that they were not involved in "training," Congress simply included them into the category of "active duty for training" pursuant to § 2024(f). These persons were not given rights beyond the activity included by § 502, but were given the same rights as those under §§ 503-505.[44] It seems clear that Congress, realizing that some activity under § 502 was full-time, added § 502 to the top part of § 2024(f). Without this inclusion, like those similarly situated persons under §§ 503-505, persons engaged in activity other than for training would not be protected.

The inclusion of § 502 in § 2024(f) is not an inclusion of only § 502(f) to the exclusion of § 502(a)(1) and (2). On its face, then, and in accordance with the House Report,[45] § 502 includes components of full-time "training or other duty." Unfortunately, the term "full-time" is not defined, either in the original version of § 9(g)(5) of the Universal Military Training and Service Act[46] which later became § 2024(f), or in the amended version. Section 9(g)(5) also uses the words "full-time training or other full-time duty"[47] which also appear in the 1980 amendment of § 2024(f). These words encompassed those attending summer camps with the

[43]These persons are not inductees (38 U.S.C. § 2021(a)), they are not enlistees (38 U.S.C. § 2024(a)), they are not ordered or called to active duty (38 U.S.C. § 2024(b)), and they are not engaged in an "initial" period of active duty for training (38 U.S.C. § 2024(c)).

[44] H.R. Rep. No. 498, 96th Cong., 1st Sess. 49 (1979).

[45]*Id.*

[46]Act of July 12, 1960, Pub. L. No. 86-632, § 1, 74 Stat. 467 (1960); S. Rep. No. 1672, 86th Cong., 2d Sess., *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3078-79.

[47]*Id.*

Regular Army,[48] those attending schools conducted by the Regular Army and those who participate in small arms competitions, [49] and those who attend service schools and engage in pilot training.[50] Congress made no effort to define or redefine "training" or "other duty" when § 2024(f) was amended. Consequently, these provisions have no specific meaning outside the context of § 502 and, as with § 2024(d), their meaning and application is a matter of statutory construction.[51]

As demonstrated in § 502(f)'s legislative history, the purpose of the "training or other duty" language is to allow members of the National Guard who incur disability while they are performing training duty ancillary to the regularly scheduled drills or summer camps of their units, "hospital benefits, pay and allowances, or other compensation as would be received by a member of the Regular Army or the Regular Air Force if they were disabled in the line of duty."[52] Thus, in using these terms, Congress was not concerned with extended leaves or AGR tours. The explanation provided by the Senate for the amendment establishes that Congress was concerned with providing protection for members who incurred disability while performing additional training or duty collateral to their drills and camps.[53]

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[48]32 U.S.C. § 503.

[49]32 U.S.C. § 504.

[50]32 U.S.C. § 505.

[51]"Under the rule of *ejusdem generis*, where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). Applying this rule of statutory construction, the terms "training or other duty" are limited by the express enumerations in § 502(a)(1) -- drills -- and in § 502(a)(2) -- summer camps.

[52]S. Rep. No. 1584, 88th Cong., 2d Sess., *reprinted in* 1964 U.S.Code Cong. & Admin. News 3800, 3800.

[53] Members of the National Guard are frequently required to perform duties in addition to those performed by them at regularly scheduled drills. Examples are: (*a*) A battalion commander who might attend the drill at his unit headquarters on one night and then inspect the training of one of his batteries or companies at another drill period during the same week; (*b*) pilots of the National Guard are required to fly a minimum number of hours each year and cannot fly all their missions during scheduled drill periods; and (*c*) vehicle drivers and other specialists of a unit may be assembled for specialized training in a non-paid status after having drilled with their units earlier in the same week.

* * *

The committee amendment is not intended to encourage any additional training with pay; instead, its purpose is to make consistent the comparable provisions applicable to the Reserve and the National Guard.

* * *

The bill is not intended to provide additional pay for the training and duty that would be authorized, or to encourage any additional drill pay periods.

Id. at 3800-3802.

Thus, the "training or other duty" of § 502(f) was never intended "to encourage any additional drill pay periods"[54] much less encompass a three-year or longer extended tour of duty in the AGR program.[55]

5. *The 1982 Explanatory Statement of Compromise Agreement did not amend 38 U.S.C. § 2024(d).*

The Solicitor also claims that an Explanatory Statement of Compromise Agreement, 128 Cong. Rec. 25,513 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 3012,

[54]*Id.*

[55]When Congress made the 1984 definitional change in 32 U.S.C. § 101(19) (*see* Brief of Petitioner at 35, n. 26) relegating "full-time National Guard duty" to "active duty for training," Congress apparently realized that "active duty for training" was subordinated to "active duty" and protected under 10 U.S.C. § 265 or 10 U.S.C. § 672(d). It would have been a simple matter, if a substantive amendment to § 502(f) was intended, to either amend § 502(f) or to include AGR guard members under the protection of § 2024(b). Brief of Petitioner at 33, n. 25.

supports the position that leave rights under § 2024(d) are unlimited. Brief of Petitioner at 32, n. 24. The Solicitor, however, does not properly characterize the Explanatory Statement, and makes no effort to show the context leading to the Explanatory Statement. The Explanatory Statement refers to "the 90-day limit," 1982 U.S. Code Cong. & Admin. News at 3020, not to "durational limits" contended by the Solicitor. *Id.* The Explanatory Statement goes on to refer to "the 90-day limit" as "this arbitrary limitation." 1982 U.S. Code Cong. & Admin. News at 3020.

The Explanatory Statement expressly did not address the reemployment rights issue included in H.R. 6788, 97th Cong., 2d Sess., ___ Cong. Rec. ___ (1982).

The circumstances preceding H.R. 6788 began on May 11, 1981, when the Office of Veterans' Reemployment Rights ("OVRR") sought advice on the reemployment status of persons engaged in AG/R and ADS programs, expressing the view that neither category had any relationship to the reserve training referred to in §§ 2024(c) (it was not "initial"), 2024(d) (it was not "training"), or 2024(f) (it was not "training").[56]

The advise memorandum sought to find protection under the law for those engaged in these programs and suggested § 2024(b)(2) as a possible source.[57] The Associate Solicitor of Labor's reply to OVRR is dated October 8, 1981, and it leaves no doubt that the legislative history of § 2024(d), reviewed above, contemplates leaves of less than three months.[58] The Associate Solicitor's opinion reviews and cites H.R. Rep. No. 1263, 86th Cong., 2d Sess. 7 (1960) and S. Rep. No. 1070, 87th Cong., 1st Sess. 2, *reprinted in* 1961

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[56]H.R. Rep. No. 782, 97th Cong., 2d Sess. 3-4 (1982).
[57]*Id.*
[58]*Id.* at 5.

U.S. Code Cong. & Admin. News 3319, 3320. He advised "legislation to amend the Act would be necessary."[59] Within the next month following the Associate Solicitor's letter, the OVRR's director issued an interpretation that, *inter alia*, placed AGR personnel under § 2024(b)(1) and (2) and thus within the scope of the full coverage provided in § 2021.[60] His interpretation also states that § 2024(d) covered active duty or inactive duty for training of 90 days or less and recommended legislative amendment if longer periods were desired.[61] As recommended, the House then passed H.R. 6788, which included an amendment to § 2024(d) that would afford protection

> for a total of [not] more than 365 days (excluding required weekend drills and required annual two-week training periods) within any 36-month period."[62]

The House passed H.R. 6788 on September 14, 1982,[63] but it was never enacted by Congress.

Based on the above "history," including a failed or aborted bill, the OVRR made another handbook entry to the effect that § 2024(d) contained no limit on "number, frequency, or duration of the training duty periods." Brief of Petitioner at 32, n. 24.

There have been no substantive amendments to § 2024(d) since 1960.

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[59]*Id.* at 6.
[60]*Id.* at 7.
[61]*Id.* at 8.
[62]*Id.* at 13.
[63]Explanatory Statement, 1982 U.S. Code Cong. & Admin. News 3012, 3020.

6. *The scope and duration of employment rights under 38 U.S.C. § 2024(d) has not been delegated to the military.*

Since 1940, on many occasions, Congress has amended the employment protection statutes to correspond with needed change.[64] It has not delegated this task to the military. The express will of Congress in subsequent legislation is required before a prior statute's purpose can be completely transformed. This is not a job for the courts, but is entrusted exclusively to the legislative branch.

The contention that the courts are free to expand the coverage of 38 U.S.C. § 2024(d) beyond the scope intended by Congress, bounded only by the imagination of the military in devising new categories of duty,[65] is clearly without merit. As noted by this Court, the duty of the judiciary is to construe, rather than rewrite legislation. *United States v. Rutherford*, 442 U.S. 544, 555 (1979).

In construing the legislation at issue here, it is the intent of the Congress that wrote and passed the legislation that must control:

> The question here, as in any problem of statutory construction, is the intention of the *enacting body*.

United States v. N.E. Rosenblum Truck Lines, 315 U.S. 50, 53, (1942) (emphasis added). The "enacting body" of the statutory provision that was to become 38 U.S.C. § 2024(d)

[64]Selective Service Act of 1948, Pub. L. No. 80-759, ch. 625 § 9, 62 Stat. 614, __, (1948); Universal Military Training and Service Act, Pub. L. No. 82-51, ch. 144 § 1(s), 65 Stat. 86, ___(1951); Act of July 9, 1956, Pub. L. No. 84-665, § 1, 70 Stat. 509 (1956); Act of July 12, 1960, Pub. L. No. 86-632, § 1, 74 Stat. 467 (1960); Act of October 4, 1961, Pub. L. No. 87-391, § 75 Stat. 821 (1961); Act of August 17, 1968, Pub. L. No. 90-491, § 1, 82 Stat. 790 (1968); Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, ch. 43 §§ 2021-2026, 88 Stat. 1578, ___- ___(1974); Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 966-466, § 511, 94 Stat. 2171, ___. (1980).

[65]Brief of Petitioner at 30-32.

was the 86th Congress,[66] and it is the purpose of that Congress that the law must effectuate,[67] even if the literal wording of the statute does not make that purpose plain:

> Where the plain meaning of words used in a statute produces an unreasonable result "plainly at variance with the policy of the legislation as a whole," we may follow the purpose of the statute rather than the literal words.

Id, at 55.

In accord are the words of this Court found in *Nordone v. United States*, 308 U.S. 338, 340, (1939):

> Meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated.

Expansion of the coverage of a statute to embrace a class of persons, the membership of which is to be determined solely by the military arm of the executive branch of the government, amounts to a judicial reassignment of the legislative function to the executive branch, a result surely not contemplated or permitted under the Constitution.

Viewed in this light, the Explanatory Statement appears to be nothing *more* than a rejection of the 90-day arbitrary limitation[68]advanced by the OVRR, and the 1980 amendment to § 2024(f) nothing *more* than a recognition that there is/was an element of full-time duty under 32 U.S.C. § 502(f).

[66]*See supra* notes 29, 30 and accompanying text.

[67]It is clear that the views of subsequent Congresses cannot override the unmistakable intent of the enacting one. *Teamsters v. United States*, 431 U.S. 324, 354, n. 39 (1977); *see also United States v. United Mineworkers of America*, 330 U.S. 258, 281-282 (1947).

[68]The "reasonableness standard," discussed *infra*, has never included "the 90-day arbitrary limitations" as a basis to deny leaves of absences to National Guard members.

II. THE REASONABLENESS TEST IS APPROPRIATE AND THE COURT OF APPEALS APPROPRIATELY APPLIED IT TO DENY KING A THREE-YEAR LEAVE OF ABSENCE UNDER 38 U.S.C. § 2024(d)

A. *The reasonableness standard or test is an interpretative aid to find and fulfill the intent of Congress while protecting important rights of employees under 38 U.S.C. § 2024(d).*

The Solicitor attacks the "reasonableness" test enunciated in *St. Vincent's Hospital v. King*, 902 F.2d 1068 (11th Cir. 1990); *Eidukonis v. Southeastern Pa. Transp. Auth.*, 873 F.2d 688 (3d Cir. 1989); *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987) and *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981) on the basis that it "frustrates the statutory purpose," Brief of Petitioner at 20; that it places in jeopardy those serving under the AGR Program and others who take or may want to take "lengthy" leaves, Brief of Petitioner at 25; that it threatens the ability of the National Guard to fill "pivotal positions requiring lengthy tours of 'active duty for training,'" *Id.*; and that it is an "unpredictable" creature of the judiciary," *Id.*

Some of these challenges are correct and some are statements of speculation with no resort to the record or to reality. King testified he would have accepted the military assignment even in the absence of employment rights protection. Thus, on this record, it is speculation to suggest that the decision below and others like it jeopardized the AGR Program.

There is an element of "unpredictability" when a reasonableness test is used in this context or in any other context. It would be easier if the statute clearly enumerated the leave limits, if any, or stated that the only qualifier, as suggested by the Solicitor, was to have "properly issued bona fide military orders." Brief of Petitioner at 37. That the statute does not go

that far is evident. It does not advance the cause to shout "judicial encroachment" when, in fact, the judiciary has diligently protected the rights of National Guard members. Without the reasonableness test, which is unsatisfactory to most employers, a reading of the history and purpose of the enactment would lead directly to a strict but short limit on leaves of absences. Employers generally would be more than willing to accept that decision.

Unlike the Eleventh Circuit's finding, the legislative history is not "self-contradictory," *St. Vincent's Hospital v. King*, 901 F.2d 1068, 1072 (11th Cir. 1990). One need not look beyond this Court's opinion in *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981) and the memoranda between the OVRR and the Department of Labor, H.R. Rep. No. 782, 97th Cong., 2d Sess. 3-10 (1982), to conclude that § 2024(d) protects employees on military assignments of less than three months. Also, the plain words in the statute and the placement of § 2024(d) in context with other provisions of the law reveals that short-term leaves are the only kind protected by § 2024(d). If the contrary is true, to read into the statute authority for leaves of three years and beyond would be unreasonable.

It is unreasonable, at least based on 1960 conditions, to conclude that Congress provided greater leave requests to National Guard members serving in their State Capitols than it provided inductees or enlistees or reservists called or ordered to duty.[69] Likewise, the idea of a three-year leave of

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[69]Contrary to the Solicitor's suggestion, the protection granted to "volunteers for regular military service," Brief of Petitioner at 39, is *not* "without any qualifications." *Id.* The coverage afforded to these persons is contingent on changed "employer's circumstances" which may render it "impossible or unreasonable" to reemploy the person. In addition, the person is not guaranteed the same job he or she left, but only a "like position." Further, this reinstatement is only required if the person is "still qualified." 38 U.S.C. § 2021(a)(B).

absence is absurd based upon employment standards in either 1960 or today. It is also unreasonable to expect a National Guard person to return to work on the first day after a three-year leave expires.

From the Hospital's point of view, it *was* necessary and reasonable to hire and train a replacement for King, its only Manager of Protective Services. Under the Solicitor's view, such a replacement would necessarily have to be temporary since King is entitled to reclaim his precise job upon conclusion of his three-year term of National Guard service, assuming the leave is not extended. It is difficult to attract a qualified temporary replacement under these circumstances. Also, King would almost certainly have to be retrained upon his return three years hence. Under the Solicitor's view, the Hospital would not be afforded the option of returning King to his job only if he were then "qualified," or even of finding him a comparable position, but would be forced to return him to his previous position regardless of his qualification. Three years or more is a long time to maintain satisfactory skill levels, especially where the job involves matters of high technology or compliance with government regulations and programs.

It is true that § 2024(d) does not contain an express reasonableness standard. To that extent, the reasonableness standard is a judicial doctrine. More importantly, however, it is an interpretive aid designed to find and fulfill the intent of Congress, not to override it.

As stated in *Sorrells v. United States*, 287 U.S. 435, 450 (1932):

> "The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statutes here in question reasonably . . . "

General words, like those found in 38 U.S.C. § 2024(d) and (f) and in 32 U.S.C. § 502(f), are to be limited by construction "to those objects to which the legislature intended to apply them," *United States v. Palmer*, 3 Wheat. 610, 631, 16 U.S. 610, 631, 4 L. Ed. 471 (1818) (Marshall, C. J.), and "It will always . . . be presumed that the legislature intended exceptions to its language" where necessary to avoid "an absurd consequence." *United States v. Kirby*, 7 Wall 482, 486-487, 74 U.S. 482, 486-487, 19 L. Ed. 278 (1868).[70]

As applied to this case, it is evident that § 2024(d) does not expressly impose number, frequency, or duration limitations.[71] The "general words" in § 2024(d) such as "active duty for training" and "training and other duty" in 32 U.S.C. § 502(f) are to be tempered by construction to avoid unreasonable consequences and in a manner that saves, not destroys, the purpose of the statute. But despite clear sanction as an interpretative aid, the Courts of Appeals have not been consistent in describing the so-called reasonableness test. The guiding principle in those cases where reasonableness has been applied has been "the admonition to liberally construe reemployment rights statutes in favor of those who serve their country."[72]

The first appellate court to apply the reasonableness standard to a leave request under § 2024(d) was the United States

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[70]Accord, *United States v. Katz*, 271 U.S. 354, 362 (1926); *Ozawa v. United States*, 260 U.S. 128, 194 (1922) citing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *Watt v. Alaska*, 451 U.S. 259 (1981).

[71]Except by its reference from § 2024(f) which incorporates 32 U.S.C. § 502 and other Title 32 sections and provisions.

[72]*Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1468 (11th Cir. 1987) (citing *Monroe v. Standard Oil Co.*, 452 U.S. 549, 574 (1981) (Burger, C. J. dissenting); *Coffey v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). *Eidukonis v. Southeastern Pa. Transp. Auth.*, 873 F.2d 688, 695 (3rd Cir. 1989) (citing *Coffey*, 447 U.S. at 196).

Court of Appeals for the Fifth Circuit in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). Lee, a police officer and Captain in the Florida National Guard, requested and was granted a leave of absence by the City of Pensacola for approximately two months to attend the National Guard Transportation Officer Advance Course. After beginning the course, Lee requested an additional leave of absence for approximately five more months to complete the entire training program. His latter request was denied by the City. When he failed to return to work, his employment was terminated. Even though *Lee* is the first case and the leading case, both parties therein agreed that a "rule of reason" was to be read into § 2024(d). *Id.* at 888-89.

The Fifth Circuit found that "under the circumstances of this case . . . Lee's conduct[73] did not meet the rule of reasonableness that he acknowledges as binding in such a situation." *Id.* at 890. The City did not argue that leaves under § 2024(d) were limited to short periods of time lasting less than ninety days. The "rule of reasonableness" developed because both parties to the *Lee* case agreed that a request under § 2024(d) had to be "reasonable under the circumstances."

The Eleventh Circuit adopted the reasonableness standard in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), and set out the appropriate factors to be considered in reviewing § 2024(d) leave requests, finding a one-year leave request reasonable. The employee, a medic with the Army Reserve, sought a leave to participate in a licensed practical nurse training program. Reversing the trial court, the Eleventh Circuit found that although § 2024(d)

[73]Lee was granted a seven-week leave to attend a training course. He then negotiated with the military authorities a five-month extension and without timely informing his employer of the negotiations, sought an extension of his original leave one week before he was expected to return.

> does not address the "reasonableness" of a reservist's leave request, the Fifth Circuit added a "reasonableness" gloss to section 2024(d)'s requirements. *Lee*, 634 F.2d at 889. Thus, under *Lee*, a reservist's request must be reasonable to qualify for the protections of the Veteran's Reemployment Rights Act. . . . Therefore, we must explain the *Lee* inquiry to identify legitimate factors for courts to consider.

Id. at 1468. The Eleventh Circuit found that protection under § 2024(d) depended upon the length of the leave request[74], the conduct of the employee in requesting the leave, and the burden placed upon the employer as a consequence of the employee's temporary absence. *Id.* The court determined that leave requests are presumed reasonable, that the weightiest factor in overcoming the presumption is the conduct of the employee, and that burden to the employer is not enough to make the leave request unreasonable. *Id.* at 1469. Nevertheless, in finding that the one-year leave request was not unreasonable, the Eleventh Circuit concluded that "[w]e agree that although one-year is not *per se* unreasonable, a greater length of time might reach that level." *Id.*

The Third Circuit in *Eidukonis v. Southeastern Pa. Transp. Auth.*, 873 F.2d 688 (3d Cir. 1989) adopted a "totality of the circumstances" reasonableness standard in reviewing leave requests under § 2024(d), rejecting the "three factors" test established in *Gulf States*. *Eidukonis*, 873 F.2d at 695-96. In *Eidukonis*, the employer refused to extend a leave of absence for an additional 26-day period. The plaintiff failed to report to work at the expiration of his unextended leave, and was

[74]*See, e.g., St. Vincent's Hospital v. King*, 901 F.2d 1068, 1071 (11th Cir. 1990) ("The opinion [in *Gulf States*] does not indicate that the United States took its current position that the language of Section 2024(d) could not be interpreted as requiring a showing of reasonableness.")

dismissed.[75] Apparently, *Eidukonis* was the first case in which the issue of whether or not a reasonableness standard applied to leave requests under § 2024(d) was raised by any party. *Id.* at 692. Eidukonis argued that it was inappropriate to apply a reasonableness standard to a reservist's military leave and that he had an absolute right under § 2024(d) to take military leave of any duration, subject only to a bad faith standard.[76]

While Eidukonis argued that no reasonableness test applied to his leave request, the employer did not argue that leave requests under § 2024(d) were limited to leaves of 90 days or less.[77] The court did note, however, that Eidukonis could point "to nothing in the legislative history of Section 2024(d) to indicate that Congress contemplated that it was authorizing reservists to take leaves of unlimited duration for reserve service." *Id.* at 693. The Third Circuit observed that although "[t]he military may view an employee's right under Section 2024(d) to be unlimited, . . . [this] is not our position." *Id.* at 696. Relying on *Gulf States* and *Lee*, the Third Circuit recognized that the right of employees to take military leave on request under § 2024(d) embodies an implicit requirement that the request for leave be reasonable. *Id.* at 694.

In the present case, the Solicitor also questioned the application of a reasonableness standard to employee leave requests under § 2024(d).[78] The district court rejected this argument and adopted the Eleventh Circuit's pronouncement in *Gulf States* that a leave request longer than one year might reach the level of being *per se* unreasonable. Relying on its earlier decision in *Gulf States* and on the Third Circuit's decision in *Eidukonis*, the Eleventh Circuit affirmed, holding that application of a reasonableness standard to a § 2024(d) leave request was necessary in order to prevent an absurd, unjust, or unintended result. The Court concluded:

> We hold, especially in light of the Supreme Court's statement in *Monroe* that this section of the statute was passed "to deal with problems faced by employees who had military training obligations lasting less than three months," *Monroe*, 452 U.S. at 555, 101 S.Ct. at 2514, and in view of the self-contradictory legislative history of the section, that it is appropriate for this Court to determine a definite limit beyond which any leave would be unreasonable.
>
> No case has been called to our attention in which a leave of absence of as long as three years has been held protected under Section 2024(d). We, therefore, agree with the trial court that a three year leave of absence is *per se* unreasonable.

St. Vincent's, 901 F.2d at 1072.[79]

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[75]Had the last extension been granted, Eidukonis would have served 220 straight days on military assignments, less one week of paid vacation and only one week of work. *See Eidukonis*, 873 F.2d at 690-92.

[76] As the Third Circuit recognized: "[i]f the right to take leave would be subject only to a bad faith limitation, it would in effect be unlimited in duration." *Eidukonis*, 873 F.2d at 694.

[77]*Eidukonis*, 873 F.2d at 693 ("We do not suggest that section 2024(d) is by its terms inapplicable to reservists who take more than 90-day leaves, an argument that has not been made by SEPTA.").

[78]"Unlike the unsuccessful employee in *Lee* and the successful employee in *Gulf States*, the United States takes the position in this case, that 'the plain' language of 38 U.S.C. § 2024(d) does not place any limitations on the duration of a leave of absence protected by the Act." *St. Vincent's*, 901 F.2d at 1070.

[79]The *St. Vincent's* Court also found that "even if we should find that the trial court erred in finding a three year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed." 901 F.2d at 1072.

The Fourth Circuit in *Kolkhorst v. Tilghman*, 897 F.2d 1282 (4th Cir. 1990), *petition for cert. filed*, No. 89-1949, found that the Baltimore Police Department's actions in establishing a quota for reservists violated the nondiscrimination provisions of § 2021(b)(3). With regards to § 2024(d), the court opined, "We do not believe that reasonableness is required under Section 2024(d)" . . . and "the reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." *Id.* at 1286.

B. *King's request of St. Vincent's for a three-year leave of absence to serve as State Command Sergeant Major of the Alabama National Guard is unreasonable.*

Although § 2024(d) does not state the period of time for which an employee may obtain a leave of absence to attend training as a reservist or National Guard person, such leave requests necessarily must have some limit. As discussed *supra*, the language, legislative history and purpose of § 2024(d) indicate that Congress contemplated at most leaves of short duration lasting only 30, 60 or 90 days. *Monroe*, 452 U.S. at 554-55; *Eidukonis*, 873 F.2d at 693; *Gulf States*, 811 F.2d at 1469.

Employees within the ambit of § 2024(d) are supposedly part-time soldiers and full-time civilian employees. To allow National Guard members greater rights than inductees, enlistees, and those called or ordered to duty would clearly frustrate the intent of Congress in working a compromise between the obligations of a part-time soldier to his government and a full-time employee to his civilian employer.

A three-year leave of absence for the Protective Service Manager would place a difficult burden on St. Vincent's.

R1-39. The Protective Service Manager is an important position that is unique within the Hospital. No other employee has the same responsibilities as the Protective Service Manager. The uncertainty created by a temporary replacement in such a sensitive position prevents the Hospital from efficiently protecting the safety and welfare of its patients and employees. Moreover, the interim manager cannot be effective in implementing changes or new policies or programs because of the temporary nature of his position.

Under the facts of this case, the Eleventh Circuit was correct in placing a durational limit on § 2024(d) leave requests. The role of the judiciary is to implement the will of Congress. It is clear that the Eleventh Circuit has applied the reasonableness test in favor of the employee even where the duration of the request exceeded the statutory mandate. *Gulf States*. Its opinion below, however, finds that there are clear limits beyond which it will not go in striking a reasonable balance. While one year may find some support in the legislation, three years is simply too much to ask.

In arguing that King's request was reasonable, the Solicitor does not purport to follow the judicially approved path of finding exception to the general phraseology in § 2024(d), a path that avoids harsh results while promoting the purpose of the legislation. Instead, the Solicitor urges the Court to perform the legislative function of moving AGR leaves from "active duty for training" to the broader protections found in § 2024(a)(B). While the director of OVRR is apparently free to issue handbook interpretations based on which way the political wind is blowing at the time, H.R. Rep. No. 782, 97th Cong. 2d Sess. 6-10 (1982), the Court should follow the spirit and the will of the legislation and leave legislative matters to the Congress.

C. *Professional military decisions should be left to the military, but those decisions must be subordinate to the will of the legislature.*

The Solicitor is seeking too much in the claim that the "courts should not question the reasonableness of the length . . . for training, so long as the leave is supported by properly issued bona fide military orders." Brief of Petitioner at 37. Such a claim is tantamount to saying that this Court should ignore the legislative branch of government. The legislature has provided rights to National Guard persons and others, but in so doing, the legislature did not abrogate its legislative function to the military.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals is due to be affirmed.

Respectfully submitted,

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